

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. _____

FRIENDS OF ANIMALS,

Plaintiff,

v.

GEORGE ERVIN "SONNY" PERDUE III, in his official capacity as United States Secretary of Agriculture, and
UNITED STATES FOREST SERVICE, an agency of the United States,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiff, Friends of Animals, brings this action to remedy violations of the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* Specifically, Friends of Animals challenges the failure of the United States Forest Service (USFS) to provide responsive documents within the time required under FOIA for three FOIA requests.

2. First, on February 14, 2019, Friends of Animals submitted a FOIA request to USFS for documents and records held by USFS, for the time period starting January 1, 1970 through the date that USFS completes the FOIA request, related to unbranded and/or unclaimed horses in or around the Heber Wild Horses Territory (Case Number 2019-FS-R3-02347-F) (hereinafter "Heber Request").

3. Friends of Animals requested all records in USFS's possession, whether received, created, and/or distributed by USFS that relate to or mention: (1) any and all

records of unbranded and/or unclaimed wild horses that existed in and around the Heber Wild Horse Territory; (2) censuses and/or inventories of wild horses in and around the Heber Wild Horse Territory; and (3) methodologies and reports about how censuses and/or inventories of wild horses were conducted.

4. Second, on May 9, 2019, Friends of Animals submitted a FOIA request to USFS for documents and records held by USFS, for the time period starting January 1, 2018 through the date that USFS completes the FOIA request, related to the adoption and sale of wild horses removed from the Devil's Garden Plateau Wild Horse Territory (Case Number 2019-FS-WO-04239-F) (hereinafter "Devil's Garden Request").

5. Friends of Animals requested all records in USFS's possession, whether received, created, and/or distributed by USFS that relate to or mention all applications to purchase and/or adopt horses, all bills of sale, all health records for horses held for adoption and/or sale, and all correspondence regarding the adoption and/or sale of wild horses removed from the Devil's Garden Plateau Wild Horse Territory.

6. Third, on June 24, 2019, Friends of Animals submitted a FOIA request to USFS for all documents and records held by USFS for the time period starting January 1, 1970 through the date that USFS completes the FOIA request relating to any horses in or around the Tonto National Forest, including horses observed on Fort McDowell Yavapai Nation lands and Salt River Pima-Maricopa Indian Community lands (Case Number 2019-FS-R3-04921-F) (hereinafter, "Salt River Request").

7. Friends of Animals requested all records in USFS's possession whether received, created, and/or distributed by USFS including, but not limited to: (1) records of unbranded and/or unclaimed wild horses that existed in and around the Tonto National Forest; (2) censuses and/or inventories of wild horses in and around the Tonto National Forest; (3) methodologies and reports about how censuses and/or inventories of wild

horses were conducted, including the 1970s wild horses census guidelines; (4) records pertaining to horses' status as not wild, including records of claimed horses that existed in and around the Tonto National Forest, and records on the process of verifying whether horses were claimed; and (5) Performance Reports submitted pursuant to the Intergovernmental Agreement between Arizona Department of Agriculture and the United States Department of Agriculture, Tonto National Forest.

8. As of the date of this Complaint, USFS has not issued any documents in response to the Devil's Garden Request or the Salt River Request and USFS has not issued a final determination on the Heber Request.

9. USFS is unlawfully withholding public disclosure of information that Friends of Animals is entitled to receive under FOIA. USFS failed to comply with the statutory mandates and deadlines imposed by FOIA by failing to provide documents resolving Friends of Animals' requests within the time required by law. Accordingly, Friends of Animals seeks declaratory relief establishing that USFS violated FOIA. Friends of Animals also seeks injunctive relief directing USFS to promptly provide the requested material.

JURISDICTION AND VENUE

10. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA) and 28 U.S.C. § 1331 (federal question).

11. This Court has the authority to grant declaratory relief under 28 U.S.C. §§ 2201 *et seq.* (Declaratory Judgment Act) and injunctive relief under 5 U.S.C. § 552(a)(4)(B) (FOIA). An actual, justiciable controversy exists within the meaning of the Declaratory Judgment Act between Plaintiff and Defendants. This Court has jurisdiction, on receipt of a complaint, "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B).

12. Venue is proper in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases in the district where the complainant resides or has a principle place of business. Plaintiff, Friends of Animals' Wildlife Law Program resides in Colorado and has a principal place of business in Centennial, Colorado. Venue is also proper under 28 U.S.C. § 1391(b) because Defendant is subject to the Court's personal jurisdiction in this judicial district.

PARTIES

13. Plaintiff, FRIENDS OF ANIMALS, is a non-profit international advocacy organization incorporated in the State of New York since 1957. Friends of Animals has nearly 200,000 members and is the requester of the records that USFS is now withholding. Friends of Animals has offices in Darien, Connecticut and Centennial, Colorado. Friends of Animals' Wildlife Law Program, the office filing this Complaint, was established in 2013 and is located at 7500 E. Arapahoe Road, Suite 385, Centennial, Colorado.

14. Friends of Animals seeks to free animals from cruelty and exploitation around the world, and to promote a respectful view of non-human, free-living, and domestic animals. Friends of Animals engages in a variety of advocacy programs in support of these goals. Friends of Animals informs its members about animal advocacy issues, and the organization's progress in addressing these issues, through its magazine, *Action Line*, its website, social media, and other reports. Friends of Animals has published articles and information advocating for the protection of wildlife species, including wild horses, so that they can live unfettered in their natural habitats. Friends of Animals regularly submits requests under FOIA to further its goals and mission. USFS's refusal to comply with FOIA injures Friends of Animals, its members, and its staff by preventing them from using the requested information to advocate for their mission.

15. Defendant, GEORGE ERVIN “SONNY” PERDUE III, in his official capacity as United States Secretary of Agriculture, has ultimate responsibility for USFS and ensuring that the agency complies with federal law.

16. Defendant, UNITED STATES FOREST SERVICE, is a federal agency within the United States Department of Agriculture. USFS is responsible for fulfilling Plaintiff’s request and complying with all federal laws.

LEGAL FRAMEWORK: FREEDOM OF INFORMATION ACT

17. Congress enacted FOIA to ensure public access to U.S. government records. FOIA carries a presumption of disclosure. *Dep’t of State v. Ray*, 502 U.S. 164 (1991). Upon written request, FOIA requires agencies of the United States government to promptly disclose their records, unless the government can lawfully withhold the records from disclosure under one of nine specific exemptions in FOIA. 5 U.S.C. § 552(a)(3)(A). The burden is on the government—not the public—to justify why particular information may be withheld. *Ray*, 503 U.S. at 164.

18. FOIA requires agencies to “determine within 20 days . . . after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of . . . such determination and the reasons therefor” and, in the case of an adverse determination, the right of such person to appeal to the head of the agency. 5 U.S.C. § 552(a)(6)(A)(i).

19. On determination by an agency to comply with the request, the records shall be made “promptly available.” *Id.* § 552(a)(6)(C).

20. In “unusual circumstances” an agency may extend the time limits up to ten working days by providing written notice to the requester setting forth the unusual circumstance and the date on which the determination is expected to be dispatched. *Id.* § 552(a)(6)(B). With respect to a request for which a written notice purports to apply the

“unusual circumstances,” the agency must: (1) notify the requester if the request cannot be processed within the time limit specified in that clause, and (2) provide the requester an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. *Id.*

21. If the agency fails to complete its response to a request within twenty workdays, the requester is deemed to have constructively exhausted administrative remedies and may seek judicial review. 5 U.S.C. § 552(a)(6)(C)(i).

22. Additionally, if the agency fails to comply with the statutory time limit, it cannot assess search fees. 5 U.S.C. § 552(a)(4)(A)(viii).

23. United States district courts have jurisdiction “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B).

FACTUAL BACKGROUND

A. Heber Request

24. Friends of Animals submitted the Heber Request to USFS’s Southwestern Region FOIA Service Center via email on February 14, 2019.

25. Friends of Animals requested documents and records held by USFS, for the time period starting January 1, 1970 through the date that USFS completes the FOIA request, related to unbranded and/or unclaimed horses in or around the Heber Wild Horses Territory.

26. Specifically, Friends of Animals requested all records in USFS’s possession, whether received, created, and/or distributed by USFS that relate to or mention: (1) any and all records of unbranded and/or unclaimed wild horses that existed in and around the Heber Wild Horse Territory; (2) censuses and/or inventories of wild horses in and around

the Heber Wild Horse Territory; and (3) methodologies and reports about how censuses and/or inventories of wild horses were conducted.

27. In its response letter, USFS indicated that it received Friends of Animals' request on February 14, 2019. Therefore, the twenty-day time period to issue a final determination passed on March 15, 2019, and the thirty-day period for unusual circumstances passed on March 29, 2019.

28. On February 21, 2019, USFS emailed Friends of Animals stating that it forwarded the Heber Request to the Apache-Sitgreaves National Forests Office and asking for clarification of the request.

29. Friends of Animals responded to USFS on February 22, 2019, and stated that Friends of Animals believed that the FOIA request reasonably described the records requested.

30. On March 1, 2019, USFS informed Friends of Animals the Heber Request will be time intensive and that USFS may send the documents in batches.

31. On March 6, 2019, USFS provided Friends of Animals an anticipated first release date of approximately 3,000 documents on March 29, 2019.

32. On March 29, 2019, Friends of Animals received a partial release of only 536 documents.

33. After not receiving any additional documents or correspondence from USFS, on May 22, 2019, Friends of Animals contacted USFS to ask for a completion date for the remainder of the documents. USFS responded that the request was rerouted to a different specialist. Friends of Animals questioned the sudden reroute and expressed concern that the Heber Request would end up further delayed. USFS never responded.

34. As of the date of this Complaint, Friends of Animals has not received any additional email correspondence from USFS, nor has it received any additional documents regarding the Heber Request.

B. Devil's Garden Request

35. Friends of Animals submitted the Devil's Garden FOIA Request on May 9, 2019 via email.

36. Friends of Animals requested all documents and records held by USFS, for the time period starting January 1, 2018 through the date that USFS completes the FOIA request, related to the adoption and sale of wild horses removed from the Devil's Garden Plateau Wild Horse Territory.

37. Specifically, Friends of Animals requested all records in USFS's possession, whether received, created, and/or distributed by USFS that relate to or mention all applications to purchase and/or adopt horses, all bills of sale, all health records for horses held for adoption and/or sale, and all correspondence regarding the adoption and/or sale of wild horses removed from the Devil's Garden Plateau Wild Horse Territory.

38. Although Friends of Animals sent the Devil's Garden Request on May 9, 2019 via email, USFS stated that the Washington office did not receive the request until May 22, 2019.

39. Assuming that USFS did not receive the request until May 22, 2019, the twenty-day time period to issue a final determination passed on June 20, 2019, and the thirty-day period for unusual circumstances passed on July 5, 2019.

40. On July 16, 2019, Friends of Animals emailed USFS asking about progress on the Devil's Garden Request and requested a date of completion.

41. On July 22, 2019, USFS stated that it was working with the program office to retrieve the records concerning Friends of Animals' case and that it could not give an estimate date of completion.

42. As of the date of this Complaint, Friends of Animals has not received any additional email correspondence from USFS, nor has it received any documents regarding the Devil's Garden Request.

C. Salt River Request

43. Friends of Animals submitted the Salt River Request to USFS's Southwestern Region FOIA Service Center via email and certified mail on June 24, 2019.

44. Friends of Animals requested all documents and records held by USFS for the time period starting January 1, 1970 through the date that USFS completes the FOIA request relating to any horses in or around the Tonto National Forest, including horses observed on Fort McDowell Yavapai Nation lands and Salt River Pima-Maricopa Indian Community lands.

45. Specifically, Friends of Animals requested all records in USFS's possession whether received, created, and/or distributed by USFS including, but not limited to: (1) records of unbranded and/or unclaimed wild horses that existed in and around the Tonto National Forest; (2) censuses and/or inventories of wild horses in and around the Tonto National Forest; (3) methodologies and reports about how censuses and/or inventories of wild horses were conducted, including the 1970s wild horses census guidelines; (4) records pertaining to horses' status as not wild, including records of claimed horses that existed in and around the Tonto National Forest, and records on the process of verifying whether horses were claimed; and (5) Performance Reports submitted pursuant to the Intergovernmental Agreement between Arizona Department of Agriculture and the United States Department of Agriculture, Tonto National Forest.

46. In its response letter, USFS indicated that it received Friends of Animals' request on June 24, 2019. Therefore, the twenty-day time period to issue a final determination passed on July 23, 2019, and the thirty-day period allowed for unusual circumstances passed on August 4, 2019.

47. On July 3, 2019, USFS emailed Friends of Animals stating that USFS will not be able to provide the records within twenty-work days because the Tonto National Forest Supervisor's Office is closed to all Forest Service employees. USFS stated that it anticipates that the office will not reopen for another several weeks. USFS stated that it will provide Friends of Animals records that it can access electronically.

48. On July 29, 2019, USFS emailed Friends of Animals reiterating that USFS will not be able to provide the records within twenty-work days because the Tonto National Forest Supervisor's office is still closed until further notice. USFS did not provide any documents electronically.

49. As of the date of this Complaint, Friends of Animals has not received any additional email correspondence from USFS, nor has it received any documents regarding the Salt River Request.

50. USFS has offered no reasonable explanation for its delay in responding to the Heber Request, Devil's Garden Request, and Salt River Request, and it has failed to provide a specific date for when it will comply with its obligations under FOIA.

51. USFS is unlawfully withholding public disclosure of information sought by Friends of Animals, information to which Friends of Animals is entitled to receive, and for which USFS has not provided any valid disclosure exemption.

CLAIM FOR RELIEF

(VIOLATION OF THE FREEDOM OF INFORMATION ACT)

52. Friends of Animals herein incorporates all information and allegations contained in the preceding paragraphs.

53. Through the Heber Request, Devil's Garden Request, and Salt River Request, Friends of Animals properly requested records within the control of USFS on February 14, 2019; May 9, 2019; and June 24, 2019.

54. As of the date of this Complaint, USFS has not provided all responsive records that Friends of Animals requested through the Heber Request and USFS has not provided any documents or records in response to Friends of Animals' Devil's Garden Request and Salt River Request.

55. As of the date of the Complaint, USFS has not made any claims of statutory exemption regarding the records and documents Friends of Animals requested in the Heber, Devil's Garden, and Salt River FOIA requests.

56. USFS failed to make a final determination and release all responsive records in response to Friends of Animals' Heber Request, Devils Garden Request, and Salt River Request in the time required by law and failed to make any claims of statutory exemption regarding the requested records.

57. Accordingly, Friends of Animals is entitled to injunctive and declaratory relief with respect to the release and disclosure of the records requested.

REQUEST FOR RELIEF

Friends of Animals respectfully requests that the Court enter judgment providing the following relief:

- A. Declare that USFS violated FOIA by failing to lawfully satisfy Friends of Animals' requests under FOIA;

- B. Order USFS to process and immediately release all records responsive to Friends of Animals' Heber Request, Devil's Garden Request, and Salt River Request at no cost to Friends of Animals;
- C. Retain jurisdiction of this action to ensure the processing of Friends of Animals' Requests, and to ensure that no agency records are wrongfully withheld;
- D. Award Friends of Animals costs, including reasonable attorney fees and litigation costs in this action, pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E); and
- E. Grant Friends of Animals any other relief that the Court deems just and proper.

Dated: October 15, 2019

Respectfully submitted,

/s/Jennifer Best

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